

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RODNEY P. DEAVILA,	Case No. 3:17-cv-00315-MMD-WGC
Petitioner,	ORDER
v.	
ISIDRO BACA, <i>et al.</i> ,	
Respondents.	

Petitioner Rodney P. Deavila has submitted a § 2254 petition for a writ of habeas corpus and has now paid the filing fee (see ECF No. 4). The petition be dismissed as second and successive.

28 U.S.C. § 2244(3)(A) provides: “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Where a petition has been dismissed with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005).

Petitioner indicates on the face of his petition that he seeks to challenge the state judgment of conviction in case no. C189184 (ECF No. 1-1, p. 2). This Court takes judicial notice of its docket, and Deavila previously filed case no. 2:06-cv-00464-KJD-PAL, in which he challenged the same state judgment of conviction. On March 25, 2008, this

1 Court dismissed the first petition as untimely, and the Ninth Circuit Court of Appeals
2 denied petitioner a certificate of appealability (2:06-cv-00464-KJD-PAL, ECF Nos. 12, 13,
3 20). This petition, therefore, is a second or successive habeas corpus petition. *Henderson*
4 *v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005). Petitioner was required to obtain
5 authorization from the Ninth Circuit Court of appeals before he could proceed. 28 U.S.C.
6 § 2244(b)(3). Petitioner has not indicated that he has received such authorization from
7 the court of appeals. Accordingly, this petition will be dismissed as second and
8 successive. Such dismissal is without prejudice to petitioner filing a second and
9 successive petition if he obtains leave of the Ninth Circuit.

10 Reasonable jurists would not find this conclusion to be debatable or wrong, and
11 the Court will not issue a certificate of appealability.

12 It is therefore ordered that the Clerk detach and file the petition (ECF No. 1-1).

13 It is further ordered that the petition is dismissed as a successive petition.


14 It is further ordered that a certificate of appealability is denied.

15 It is further ordered that the Clerk add Adam Paul Laxalt, Nevada Attorney General,
16 as counsel for respondents.

17 It is further ordered that the Clerk electronically serve the petition, along with a
18 copy of this order, on respondents. No response by respondents is necessary.

19 It is further ordered that the Clerk enter judgment accordingly and close this case.

20 DATED THIS 29th day of November 2017.

21
22 
23 MIRANDA M. DU
24 UNITED STATES DISTRICT JUDGE
25
26
27
28